

PO 110 - Hicks - Attachment of a collection of Voir Dire materials concerning the Presiding Officer, Colonel Peter E. Brownback III, consisting of:

- a. Biographical Summary of the Presiding Officer (1 page).
- b. Answers to Trial Guide Questions prepared by the Presiding Officer, 27 July 2004 (2 pages).
- c. Answers Concerning Certain Personal Relationships prepared by the Presiding Officer, 6 August 2004 (2 pages).
- d. Questionnaire #2 prepared by the Presiding Officer, 18 August 2004 (7 pages.)
- e. Extract, Hamdan ROT - Voir Dire of the Presiding Officer - 24 August 2004 (22 pages).
- f. Extract, Hicks ROT - Voir Dire of Presiding Officer - 25 August 2004 (20 pages).

Peter E. Brownback III

PERSONAL: Married to

**Voir Dire Question Prepared by Presiding Officer, COL Peter E. Brownback
(Taken from the Draft Trial Guide.)**

1. I do not know any accused whose case has been referred to the Commission.
2. I do not know any person named in any of the charges.
3. Of the names of witness I have seen so far, I do not recognize any of their names.
4. I do not have any prior knowledge of the facts or events in this case that will make me unable to serve impartially.
5. I do not know, and have no command relationship with, any other member.
6. I believe that I can vote fairly and impartially notwithstanding a difference in rank with other member. I will not use my rank to influence any other member.
7. I have not had any dealings with any of the parties to the trial, to include counsel for both sides, that might affect my performance of duty as a Commission member in any way.
8. I have not had any prior experience, either personal or related to my military duties, that I believe that would interfere with my ability to fairly and justly decide this case.
9. No family member, relative, or close friend that I am aware of was the victim of the events of 9-11, and has not been the victim of any alleged terrorist act. I have been told that a former Judge Advocate General's Corps officer was on one of the planes which hit the World Trade Center. This officer was assigned to Fort Bragg at some time during the period 1984 to 1988, while I was assigned there. I do not recall the last time I saw the officer, nor do I recall his name. He was not assigned to the same unit(s) to which I was assigned, although we met, I feel certain, at one or more of the judge advocate functions on base. [REDACTED]
[REDACTED]
10. I have seen and heard general media reporting about the events of 9-11, al Qaida, Usama Bin Laden, and terrorism on broadcast TV and the various newspapers. Nothing I have seen or read will have any effect on my ability to perform the duties as a Commission member fairly and impartially.
11. I promise as a Commission Member that I will keep an open mind regarding the verdict until all the evidence is in.
12. I know and respect that the accused is presumed innocent and this presumption remains unless his guilt is established beyond a reasonable doubt. I know and respect that the burden to establish the guilt of the accused is on the prosecution. I agree to be guided by and follow these principles in deciding this case.
13. I have nothing of either a personal or professional nature that would cause me to be unable to give my full attention to these proceedings throughout the trial.

14. I am not aware of any matter that might raise a question concerning my participation in this trial as a Commission member.

Peter E. Brownback III
Colonel, USA

Presiding Officer Voir Dire Addendum - Relationship with Other Personnel

a. Mr. Haynes: I believe that I once met the General Counsel at the Army's Judge Advocate General's School in 1996 or 1997 as part of an organized run. We exchanged perhaps ten minutes worth of casual chit-chat during the run. Other than that, I have had no contact with Mr. Haynes.

b. Mr. Altenburg:

1. I first met (then) CPT Altenburg in the period 1977-78, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.

2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for COL Wayne Iskra and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building.

[REDACTED] During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children - depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain.).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once -- in May of 1997, I attended a farewell dinner hosted by MG Altenburg for COL John Smith. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

6. Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his. From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe.) 2002, I attended his son's wedding in Orlando, Florida.

7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.

8. To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.

c. BG Hemingway: I had never met, talked to, or otherwise communicated with BG Hemingway until I reported on 14 July 2004.

d. Members: I have never met or talked to any of the other members of the commission. I have emailed instructions to all of them and received email receipts from all of them. A copy of what I sent to the members was provided to all counsel.

Memorandum for All Counsel

18 August 2004

Subject: Questionnaire #2 - Presiding Officer Voir Dire

1. I have received questions from counsel in Al Bahlul, Hamden, and Hicks. Many of the questions are the same or so nearly the same as to make no difference. I am answering these questions by this memorandum.
2. I refer all counsel to MCO #1, para 6B(1) and (2) - the commission is to provide a full and fair trial, impartially and expeditiously. Further, MCI # 8, para 3A(2), states that questioning of the members, to include the Presiding Officer, shall be narrowly focused on issues pertaining to whether good cause may exist for removal of any member.

3. Professional Background --

a. I have served in close ground combat only in Vietnam - where I was a rifle platoon leader and an armored cavalry platoon leader. I do not remember having any occasion to deal with enemy prisoners - either by capturing them or being involved in trying them or questioning them. However, I did work with former Viet Cong who had come over to the ARVN.

b. During my time as an infantry officer and a judge advocate, I attended many courses - some of which focused on the law of war and international law. I do not recall the where/when's for these courses. I taught various aspects of international law and law of war at the JFK Special Warfare Center for a year. To the best of my knowledge, I have not attended any courses focusing on LOAC or IL since 1984/85. However, during various presentations at general courses, I may have had some exposure to these subjects.

c. I have not received any specialized training, formal or informal, on Al Qaeda, the Taliban, Islamic Fundamentalism, or detainee operations. I have had the occasion to read newspaper and news magazine accounts of various aspects of the topics above. I also have read some articles published in the Army War College journal and the Military Law Review. Additionally, I have read numerous articles on various topics while surfing the web.

d. I am generally aware of the conduct of operations in Afghanistan and Iraq. I am interested in such operations. I have had occasion to look at the DOD website on Military Commissions. I have not seen any of the data or articles on detainee operations.

e. I have not written for publication or spoken publicly about any of the topics in paragraph 3c above.

f. I am and have been an associate member of the Virginia State Bar since 1977. I have never practiced law in the civilian sector.

4. Personal Background:

a. I was raised as a Christian. I do not attend church regularly. I have no antipathy towards Islam, or any of the other major religions. My knowledge of Islam is based primarily upon my readings and my dealings with Saudis, Kuwaitis, and others during my tour in Saudi Arabia in 1991-92. I am not an expert in the area of Islam, although I have some knowledge. I do own a Qur-An, but I do not profess to be a student of the Qur-An.

b. I entered onto the retired rolls on 1 July 1999. I intended to be retired. However, I soon discovered that I was slightly bored. Consequently, at the urging of my wife, I took several part-time jobs. These included being an enumerator for the 2000 Census, a safety person for beach renewal operations, an instructor for an SAT prep course, and an instructor at a local college. I enjoyed all of the jobs and I regretted having to quit two of them upon my recall to active duty.

c. My hearing is within deployment standards. I do not like to have people mumble - I prefer that they speak with a command voice. There is no impairment.

d. **Caveat - see 4e, below.** I belong to several military professional organizations and to various social organizations. None of them is political in nature. I do not attend meetings.

e. I do belong to a local community organization which supports various propositions involving local city management and zoning. It is political only in the sense that it wants voters to vote in accordance with its recommendations - most of which are simply anti-over-development. I have attended at least three of its meetings when the topic was one of interest to me.

f. I am registered to vote. My Voter Registration Card shows NPA in the Party block. I have not campaigned for anyone.

5. Effect of 9/11 and other events:

a. See Questionnaire #1 for the only person I knew who was killed on 9/11.

b. I knew and know many people in the Pentagon. I did not have any personal friends who were killed or injured there; however, I did have friends who were in the building when the plane hit.

c. I have many friends and others who have been stationed in Afghanistan and Iraq. I am aware of the impact of war upon soldiers and their families.

d. There was no specific impact of 9/11 and related events upon me or my family.

6. Mr. Hodges:

a. I first became aware of Keith Hodges in 1980-81. I was the Senior Defense Counsel at Fort Meade, MD. The post stockade served many posts along the east coast. One of those posts was Fort Eustis, VA, where CPT Hodges was a prosecutor. He was the lead prosecutor on a murder case - I became involved in the case through my dealings with the DC at Eustis.

b. I next saw LTC Hodges when he was the Regional Defense Counsel in Stuttgart, Germany and I was one of the military judges at Mannheim. We had numerous professional contacts and we may have been at two or three social functions together.

c. In 1992, I became the Chief Circuit Judge, 2d Judicial Circuit, Fort Bragg, NC. One of the Circuit Judges who worked for me was LTC (later COL) Hodges. We worked closely together - via telephone and electronic bulletin board (precursor to email) - until his departure for Fort Hood in 1995. During this period, I only saw him at judicial training functions and on one occasion when I promoted him to Colonel.

d. From 1995 to 1996, COL Hodges and I talked and exchanged emails routinely on various matters. We worked on the Benchbook together and we helped each other with various case-related problems. I saw COL Hodges once, during a judicial training function.

e. From 1996 until my retirement in 1999, COL Hodges and I continued to exchange ideas, suggestions, instructions, and the like by email. I saw him three times at judicial training functions.

f. Upon my retirement in 1999, COL Hodges and I had few occasions to exchange email or telephone calls while he was at Fort Hood. However, after he retired in 2000, he visited us on several occasions while going to see his parents, [REDACTED]. On one occasion, he and my wife went deep sea fishing together. When Mr. Hodges would come across a criminal law case which he thought would interest me, he would forward it to me.

g. During the period after the announcement of the Military Commissions in 2001, Mr. Hodges and I discussed the commissions on at least one occasion. He knew that I had put my name in for consideration. On 29 June 2004, I received an email from LTC [REDACTED] at OMC. In it he stated that the Appointing Authority was considering hiring a Legal Advisor to the Presiding Officer and asked if I had any recommendations. I immediately gave him Mr. Hodges' name, because:

- 1) I was personally familiar with Mr. Hodges' work and work ethic.
- 2) I was personally familiar with Mr. Hodges' knowledge of criminal law and procedure.

3) I was personally familiar with Mr. Hodges' ability to write, edit, and publish procedural matters.

4) I was aware of Mr. Hodges' performance as a military judge, both the highs and the lows.

LTC [REDACTED] asked me for Mr. Hodges' contact information and I gave it to him. Subsequently, the Appointing Authority, UP MCO #1, executed a detailing agreement with the Federal Law Enforcement Training Center - whereby Mr. Hodges would be detailed to OMC for a year. While Mr. Hodges is paid by DHS, his employer is OMC. During the period of the detail, Mr. Hodges' primary focus is OMC. Mr. Hodges has distributed a copy of the detailing agreement to all counsel.

h. Once LTC [REDACTED] and Mr. Hodges talked, I talked to Mr. Hodges and pointed out some of the problem areas in working with the commissions. He eventually decided to accept the detail.

i. Since 15 July 2004, Mr. Hodges has been part of the procedural preparation for the proceedings before the commissions. He has written procedures, written emails, written memoranda, and prepared various drafts. All of this has been done under my supervision. Mr. Hodges has also prepared memoranda and drafts which he forwarded to the Appointing Authority concerning procedural aspects of the commissions. He did this with my knowledge and consent, but acting for the Appointing Authority. To my knowledge, Mr. Hodges has had many communications with OMC personnel - most by email. I am not aware of any communications between Mr. Hodges and any members of OGC. All of Mr. Hodges' communications with OMC personnel were in the area of procedural and logistic preparation for commission proceedings. I believe that it is entirely appropriate for Mr. Hodges to discuss and make recommendations for procedural changes or structure so that the commission process may function efficiently and expeditiously.

j. Mr. Hodges and I have never discussed the substance of any of the cases currently referred to the commission for trial. We have never discussed MCI #2. All of our discussions, efforts, and work have been focused on the procedural requirements to get cases before the commission.

k. I have never had an *ex parte* discussion with Mr. Hodges concerning any of the cases referred to the commission.

7. Selection as Presiding Officer:

a. Sometime in the spring of 2002, I was told by someone that the Presiding Officers of the Military Commissions could be retired officers who were recalled to active duty. I discussed this with COL [REDACTED] Chief Trial Judge.

b. In January 2003, I got a call from OCTJ, informing that if I wanted to put my name in for PO, I had to send in a statement. I did and I did.

c. In December 2003, I read that MG (Ret.) Altenburg had been named the Appointing Authority. In January I received a call from OCTJ wanting to know if I, among others, was still interested. I was.

d. On 24 or 25 June 2004, I got a call from LTC [REDACTED] at OMC. He wanted to know if I was still interested. I was. He told me that an announcement would be made quickly. On 28 June I got four phone messages that some PAO wanted to read me a press release so that I could okay it. I never found the PAO. On 29 June 2004, the announcement was made.

e. MG (Ret.) Altenburg knew that I was interested in being on one of the commissions.

e. That is all I know about the selection process.

8. Military Commissions:

a. The Presiding Officer has specifically designated roles and duties under MCO #1 and the MCI's. Those roles and duties are different, in many ways, from those of the other members of the commission. In some areas, MCO #1 and the MCI's give the Presiding Officer the authority to act for the commission without the formal assembly of the full commission. UP the President's Military Order, the Presiding Officer can be overruled by a majority of the commission in certain areas. For a full explanation of the Presiding Officer's powers, see MCO #1 and the MCI's. As the only member of the commission who is a judge advocate, I will tell the commission what I believe the law to be. However, the President's Military Order states that the commission will decide all questions of law and fact. As with all matters of law, I invite counsel to provide motions and briefs so that I may become better informed - I note that there have been no motions or notice of motions to date on any legal topics.

b. Addressing a specific question, I did in fact state: "Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done." I then went on to say that this was based on my interpretation of the law and that my interpretation would be the one that counted "until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect." Based on a directive from the Appointing Authority, I did not and will not hold commission sessions without the full commission. This directive did change my opinion concerning my ability to hold sessions without the full commission.

c. Based on my interpretation of the MCO and MCI's, the standard for whether or not a member should sit is whether there is good cause to believe that the member can not be fair and impartial and provide a full and fair trial. The determination as to whether there is good cause to relieve a member is made by the Appointing Authority.

If I believe that there is good cause to relieve me or any other member, I am required to forward that information to the Appointing Authority for his decision.

d. I have had the occasion to review various material about military commissions. The commentary on commissions and the legality thereof is about what one would expect - a lot pro, a lot con. The commentary ranges from the legality of the commissions to the structure of the commissions to the law governing the establishment and operation of the commissions. Until these areas have been thoroughly briefed by counsel, I reserve my opinion.

e. Any service member has the right and duty to disobey an unlawful order or general order or regulation. However, the standard under Article 92 is quite high. Obviously, if the order or regulation is patently illegal, the source of the order or regulation does not mitigate the illegality.

f. Counsel are encouraged to provide briefs on the issue of "declaring an order or regulation" unlawful by the Presiding Officer of a commission. I am not prepared to address the issue at this time.

9. Personal Knowledge of Cases:

a. I have read the charge sheets in all four cases which are presently referred to the commission for trial. That is all that I have read or know about any of the cases. I have not seen the Presidential Determinations in the cases. I have not discussed the facts of the cases with anyone - either in my personal or professional capacity. Until I received the charge sheets, I had never heard the names of any of the defendants.

b. If the Prosecution proves all of the elements of an offense beyond a reasonable doubt, then a vote for a guilty finding would be appropriate. If not, then a vote for a not guilty finding would be appropriate.

c. As to the responsibility for the acts of 9/11 and others, the only knowledge I have of the acts and the perpetrators is open news media. If one were to believe what one reads, then it would appear that members of Al Qaeda were responsible for the attacks. I have no opinion as to the actions of specific individuals.

10. General:

a. My participation as a member and Presiding Officer in this commission will have an impact on my personal life. It will have no impact on my professional life - I do not have a professional life. Once these proceedings are finished, I will retire again.

b. Media interest in the case will not have an impact on how I perform my duties.

c. Other than memoranda and emails from OMC - on which counsel were cc'd, I have received no instructions, hints, suggestions, or any other form of communication

from anyone in any governmental position (to include OMC and OGC) concerning what I should do as a Presiding Officer in these proceedings. Based on my personal and professional knowledge of Mr. Altenburg, my belief is that he wants to have these cases tried fully and fairly. I have not discussed my role as Presiding Officer with Mr. Altenburg at all.

d. I am not aware of any matter which might cause a reasonable person to believe that I could not act in a fair and impartial manner in these proceedings.

Peter E. Brownback III
COL, JA
Presiding Officer

September 22, 2005

1. I, am M. Harvey, Chief Clerk of Military Commissions and the custodian of the authenticated transcript in *United States v. Salim Ahmed Hamdan*, No. 040004.
2. I certify that R. 9-26 and R. 133-135 (a total of 21 pages of transcript) (attached) are an accurate copy of the authenticated transcript in said case from the session held on Guantanamo Bay, Cuba on August 24, 2004.
3. There was no voir dire of the Presiding Officer at the subsequent hearing on November 8, 2004.

//Signed//

M. Harvey
Chief Clerk
of Military Commissions

P (CDR [REDACTED]) Prosecution does not.

DC (LCDR Swift): One moment, sir. We waive reading of the charges, sir.

PO: The reading of the charges may be omitted.

Okay. Members of the commission and alternate member, the appointing authority who detailed you to this commission has the ability to remove you from service on this commission for good cause. Is any member, or alternate, aware of any matter that you feel might affect your impartiality, or ability to sit as a commission member, which you have not identified previously in the questionnaire you filled out? Before you answer please keep in mind that any statement you might make should be in general terms.

CM (LtCol [REDACTED]) No, sir.

CM (Col [REDACTED]): No, sir.

CM (Col [REDACTED]) No, sir.

CM (Col [REDACTED]) No, sir.

CM (LtCol [REDACTED]): No, sir.

PO: Apparently not. Okay.

I have previously filled out a commission member questionnaire. I previously provided counsel for both sides a summarized biography, a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and a document concerning my knowledge of the appointing authority and other persons. I also provided all counsel with answers to other questions suggested by defense counsel. These documents will now be marked as the next RE in order. The documents are true to the best of my knowledge and belief. That document will be RE 8.

Does either side wish to voir dire me outside the presence of other members?

P (CDR [REDACTED]) No, sir.

DC (LCDR Swift): Yes, sir.

PO: The other members will retire to the deliberation room.

The panel members exited the hearing room.

PO: Please be seated. Let the record reflect the other members have left the deliberation room.

I intend to keep a copy of RE 8 with me during voir dire so counsel may direct me to a specific question.
Objection?

P (CDR [REDACTED]) No, sir.

DC (LCDR Swift): No, sir.

PO: Prosecution, voir dire?

P (CDR [REDACTED]) Sir, I believe Commander Swift requested to question you, so --

PO: No, he requested voir dire outside the presence of other members.

P (CDR [REDACTED]) Aye, sir.

PO: They are gone.

Do you want to voir dire me?

P (CDR [REDACTED]) Not at this time, sir.

PO: Commander Swift?

DC (LCDR Swift): We don't have a podium, sir. Permission to move to the court table.

PO: (Indicating)

DC (LCDR Swift): Sir, I would like to start by clarifying your membership in the Virginia bar. You indicated that you had been admitted to practice in the Virginia bar, I believe since the 1970s; is that correct?

PO: Yes.

P (CDR [REDACTED]) What? I didn't understand.

DC (LCDR Swift): I will restate the question. I would like

you -- what -- as a member of the Virginia bar what is your current position in the bar?

PO: I am an associate member of the Virginia bar.

DC (LCDR Swift): What does associate member mean?

PO: You would have to ask the Virginia bar. I have never practiced law in the civilian sector.

DC (LCDR Swift): Are you eligible to practice law in Virginia currently?

PO: I am an associate member of the Virginia bar. I am eligible to practice in Virginia if I change my status to active member.

DC (LCDR Swift): What would be required to do that?

PO: I would have to take some -- a CLE.

DC (LCDR Swift): So at this time you are not eligible to practice there?

PO: At this time I am not an active member of the Virginia bar.

DC (LCDR Swift): Are you a member in good standing --

PO: Go on.

DC (LCDR Swift): Are you a member in good standing of any other U.S. court.

PO: We have got a problem, Commander Swift. The audience cannot hear you. We are going to have to do something. I don't know if you could remove the microphone. I don't know if you can move the microphone.

DC (LCDR Swift): I will stay back here, sir.

MJ: I am only a member of the Virginia bar. That's the only bar I am a member of.

DC (LCDR Swift): Sir, would you be eligible to serve as a civilian defense counsel for this commission proceedings?

PO: I don't know. I haven't examined that.

DC (LCDR Swift): It requires you to be in good standing and a member of a court.

PO: I don't know. I haven't examined that. That question has been addressed in a CAAF case I believe.

DC (LCDR Swift): I am aware of the CAAF case, sir.

PO: Okay. Go on.

DC (LCDR Swift): You indicated that you volunteered?

PO: Yes, I did.

DC (LCDR Swift): Why?

PO: I retired in 1999 and I had no desire to do anything particularly. I had ten years of experience as a military judge, and I thought I was good at it. As a matter of fact, I still think I was good at it; and knowing the stresses and strains brought upon our military by the current operational environment and recognizing that retired people could serve, I volunteered.

DC (LCDR Swift): You in that question indicated you had been in a former military judge. Did you view when you were volunteering that you were volunteering to be a judge here?

PO: No. I viewed that I was volunteering to be a presiding officer.

DC (LCDR Swift): What did you think the presiding officer would do?

PO: At the time that I initially volunteered, the only document that had been written was MCO Number 1 -- excuse me, as well as the president's military order. I went to a dictionary and looked up presiding, and I thought that a presiding officer would preside. If you are asking me if I was aware of all of the differences between a military judge and a presiding officer, I couldn't say that I was. However, I knew that I was not volunteering to be a military judge.

DC (LCDR Swift): You mentioned that the military order and the Presidential's order had been written at the time that you volunteered. Did you read both of those documents before you volunteered?

PO: I scanned them.

DC (LCDR Swift): After scanning them, did you believe that the process was lawful?

PO: I choose not answer that question at this time. Thank you.

DC (LCDR Swift): Understand that you won't answer the question. You have an open mind now to the question of the lawfulness of the process?

PO: That's a good question. Yes, I believe that the lawfulness of establishing the commission process by the President, the lawfulness, the delegation to the Secretary and to the general counsel are all matters which may be addressed by motion. And, I believe that it is the duty of counsel to educate all members of the commission on the law.

DC (LCDR Swift): As part of your assignment or as part of being assigned as presiding officer, you have been detailed an assistant to the presiding officer?

PO: Yes.

DC (LCDR Swift): Can you describe how that happened?

PO: I believe I put the dates in my questionnaire, but basically on the 29th of June, I believe, Lieutenant Colonel [REDACTED] who works in the office of the military commissions, e-mailed me and said words to the effect of we are looking for someone to be an assistant to the presiding officer. Do you have any suggestions? Immediately and without giving the person in question a chance to comment I said, yes, [REDACTED] And I pointed out that I was aware of [REDACTED] and his good sides and his bad sides. After that, Colonel [REDACTED] e-mailed me back for his e-mail address and they talked.

DC (LCDR Swift): Was he appointed as your assistant?

PO: There was a detailing agreement. There is a detailing

agreement between Mr. [REDACTED] and -- no, between the [REDACTED] part of the [REDACTED] which is where Mr. [REDACTED]

DC (LCDR Swift): Can you explain what his duties are?

P (CDR [REDACTED]): Sir, at this time I am going to object. What we are trying to determine is whether you are qualified to preside over this proceeding. Mr. [REDACTED] is not a voting member and we feel this line of questioning is unwarranted.

PO: Thank you. Go on. Just tell me, ask me your question.

DC (LCDR Swift): I will get quickly to it, sir.

PO: That is fine.

DC (LCDR Swift): You supervise Mr. [REDACTED] is that correct?

PO: Yes.

DC (LCDR Swift): Mr. [REDACTED] has had contact with the appointing authority; is that correct?

PO: Yes.

DC (LCDR Swift): Did he do so at your direction?

PO: He has done many -- he has had many contacts with the appointing authority at my direction. He has had many contacts with the appointing authority at my consent. He has had many contacts with the appointing authority that I didn't hear about until after he talked to him. His duties are divided into various ranges. For instance, he has been here since the 9th of August arranging to get things done. When the CCTV broke down this morning, he was the one who arranged to get it fixed. When your interpreter couldn't get a head set, he was the one to whom you came to get a head set. That's one set. He also is the best person I have ever known for drafting, writing, coordinating, and publishing procedures; and he works in that area. He also functions to work out the procedural aspects of the cases. For instance, he has provided to all counsel on this case a listing of all the motions and responses and

whatever. Okay, those are three general areas.

DC (LCDR Swift): I want to address, second, the publishing and drawing of scripts, et cetera.

PO: Okay. Go on.

DC (LCDR Swift): Does he work exclusively for you in that capacity or has he worked exclusively for you in that capacity?

PO: On the 19th of August I believe, I could be wrong, the appointing authority published a memorandum stating that [REDACTED] exclusively for me. So there you know -- just a second, we know from the 19th he works for me; right?

DC (LCDR Swift): Yes, sir.

PO: Okay. Before that he provided, and you have got copies of all of this, various suggestions to the office of military commissions on how to write or create procedural changes and the procedures for these commissions. There.

DC (LCDR Swift): Was that after charges had been referred against Mr. Hamdan?

PO: Right.

DC (LCDR Swift): So he was writing how to change the procedures after the charges had been referred?

PO: Right.

DC (LCDR Swift): And you viewed that as appropriate?

PO: Yeah, I did.

DC (LCDR Swift): It didn't concern you that it would be ex pos facto changes after we had established a commission and charges had been referred to it?

PO: I didn't consider that the changes would come into effect in any time to affect anyone. These were changes to the commission procedures as a whole, not changes necessarily affecting Mr. Hamdan and if you believe that they would then I would have expected you to file some

motion saying that these procedures can't be changed because they would affect Mr. Hamdan adversely.

DC (LCDR Swift): To date, I don't know that any have; but I know communication has occurred.

PO: Thank you.

DC (LCDR Swift): So I would respond that until they actually are changed there is no ex pos facto issue.

PO: Thank you. I agree.

DC (LCDR Swift): What I am concerned about though is that there is conversations about changing and applying them to ex pos facto.

PO: Okay, that's that concern. Go on.

DC (LCDR Swift): Other than the meetings that we put on the record earlier, have you met with military counsel regarding those proceedings in the past?

PO: I had that meeting with all the counsel on or about, all the counsel who were in D.C. on or about the 15th of July. And I had a meeting with all the counsel who showed up yesterday on the 23rd of August.

DC (LCDR Swift): During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?

PO: No, I didn't.

DC (LCDR Swift): I wasn't at the meeting, but I was told that you did. I don't --

PO: Thank you.

DC (LCDR Swift): Did you mention speedy trial at all?

PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.

DC (LCDR Swift): But you didn't expect -- while those things were

mentioned, you don't recall expressing an opinion yourself?

PO: No. I didn't have any motions or anything.

DC (LCDR Swift): Now, based on the trial script that we have been provided, you intend to instruct the members on the law; is that correct?

PO: Yes.

DC (LCDR Swift): How are you going to avoid having an inordinate influence in respect to each of their opinions while doing that?

PO: I don't understand your question.

DC (LCDR Swift): Well, historically and certainly barrowing from the judge's bench book, it says that each member should have an equal weight in deciding any opinion. Here they are deciding both fact and law. How, after you have instructed them, will they have the opportunity to have an equal opinion as to what the law is?

PO: You refer to the trial script. Did you read farther what I said there?

DC (LCDR Swift): I did.

PO: What did I say?

DC (LCDR Swift): In that portion, you said that they were free to disagree with you.

PO: And?

DC (LCDR Swift): I also read --

PO: Come on.

DC (LCDR Swift): -- in the trial script where you say to them, "I am the only lawyer; and therefore, I will instruct you on the law." Don't you agree that that gives you positional authority?

PO: Commander Swift, if you are going to read something let's read it all.

DC (LCDR Swift): Yes, sir.

PO: As I am the only lawyer appointed to the commission. Now that is a fact; right?

DC (LCDR Swift): That is true, sir.

PO: I will instruct and advise on the law. However, the President has directed that the commission will decide all questions of law and fact, so you are not bound to accept the law as given to you by me. So what have I told them, okay -- I am not going to argue the point. The point is that they are all military officers. They have all sworn to do their duty and I will advise them on the law as I have been required to do. And, I don't see how you can get around that.

DC (LCDR Swift): My concern comes in their ability after being instructed that you are a lawyer, and you know the law, that you will have an unequal voice in any deliberations. That is something to be avoided, looked at ranks, looked at procedures, that's not happening, and how would we avoid that with the current instruction that we have? It says you are free to disagree, but I am a lawyer and I am probably right.

PO: Whoa, whoa, it does not say that. But that -- okay, so you object to the instruction?

DC (LCDR Swift): Yes, sir. In determining not only on the instruction also concerned is in your ability to sit as the senior member or as the presiding officer that you will ensure that each member has an equal voice in every decision.

PO: I will.

DC (LCDR Swift): Lastly, influence -- yesterday, during the meeting -- during our meeting yesterday, it was discussed whether we would hold up these proceedings pending the appointment of a security officer. Do you recall that, sir?

PO: Yes.

DC (LCDR Swift): During that, you mentioned that holding it up would have an impact vis-a-vis the media. Do you agree with that?

PO: If you say I did. I believe what you say, but go on.

DC (LCDR Swift): At least by that statement, it sounds like the media is having an impact on how you are making decisions.

PO: No. I think what that statement meant was that having been the poor person who had to orchestrate getting hundreds of people to various places at various times, that I sympathize and that we would do what we could to handle it. For instance, this morning with the CCTV broke down, we delayed -- we have delayed the start of these proceedings --

DC (LCDR Swift): We have a translation issue, sir. When we switched translators, he is no longer understanding anything being said.

PO: Can we switch to another translator? The court is addressing the table of translators -- the commission is addressing -- I am addressing the table of translators. Can we switch to another translator?

The translators changed positions.

PO: For instance, this morning when we had that CCTV break, we delayed the proceeding for 30 minutes to start so that the feed to the off-site viewing location could be established. If you mean am I concerned about what the media says or writes about me, no.

DC (LCDR Swift): Understand, sir. I don't have any further questions.

PO: Challenge?

P (CDR [REDACTED]) I have some additional questions, sir.

PO: Go on.

P (CDR [REDACTED]) Sir, Military Commission Order Number 1 states that a presiding officer needs to be a military officer whose a judge advocate of any United States armed force. As you sit here today, do you meet that criteria, sir?

PO: Yes.

P (CDR [REDACTED]) Sir, you received some questions from Commander

Swift about whether the establishment of commissions was lawful and the executive order was lawful. As you sit here today, have you made any predeterminations with respect to those questions?

PO: All of the counsel in the courtroom are familiar with the Uniform Code of Military Justice. If an order is patently illegal, that is one thing. However, if an order is questionable, which apparently some people thinks it is, then an officer or any member of the service has a duty to comply while determining whether or not it is illegal.

P (CDR [REDACTED] Now, sir, the notice of motions for the defense was due on the 19th of August. Have they filed any such notice of motion challenging the legality of those orders?

PO: That -- please sit down, Commander Swift. You look like you are about to jump. Don't jump. Don't worry about that.

P (CDR [REDACTED] Sir, will the role of the assistant to the presiding officer in any way impact your ability to fairly decide matters in this case?

PO: In so far as he takes so much off my back, yes, it will because I don't have to worry about all the admin stuff that he has been sucking up. But in terms of his impacting my vote, my voice, no.

P (CDR [REDACTED] Now you say that there have been several contacts between [REDACTED] you used the term, appointing authority.

PO: I thought I said OMC, but maybe I didn't. I meant the circle around Mr. Altenburg?

P (CDR [REDACTED] So that doesn't necessarily mean he is speaking with Mr. Altenburg directly, but could be speaking to the staff person of Mr. Altenburg?

PO: Right.

P (CDR [REDACTED] Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly

decide those motions?

PO: No.

P (CDR [REDACTED]) As far as your interaction with the other members, do you consider them to have equal votes in this case?

PO: Yes.

P (CDR [REDACTED]) Do you consider them to be on equal footing with respect to votes as to what the law is?

PO: Yes.

P (CDR [REDACTED]) If they need or request assistance, not being legally trained as you are, in trying to determine what the law is will you take steps to get them that assistance?

PO: To get them what?

P (CDR [REDACTED]) Assistance to help them understand the law?

PO: Yes.

P (CDR [REDACTED]) Sir, are you aware of any actions or are underway to hire court clerks to assist the other commission members?

PO: I received -- and I forget when it was -- in the last month a draft, I believe, of a hiring of someone, a position nomination for someone to work in the office of the presiding officers. Where that is I don't know.

P (CDR [REDACTED]) Sir, is the media in any way going to impact your ability to fairly decide this case?

PO: No.

P (CDR [REDACTED]) If it is a question to providing the accused a fair trial and accommodating the media, where will that decision lie?

PO: We have spent a lot of money to get six people here to look at Mr. Hamdan across this table. We are here so that these six people can carry out to President's order to provide a full and fair trial for Mr. Hamdan.

P (CDR [REDACTED]) I have no further questions, sir.

PO: Thank you.

DC (LCDR Swift): May I have a moment?

PO: Yes.

DC (LCDR Swift): Sir, in your answers to Commander [REDACTED] you indicate that you take steps to assist the other members understanding the law. What steps would those be?

PO: Well, since I don't know -- I am not being sarcastic -- I don't know what the situation would be. The first step is that counsel will provide motions on the law and the second step is that counsel will be allowed to argue what the law is. If the commission members decide that they need any more instruction on the law, then I will decide that then. I don't know. I don't know what they are going to need. I can't tell you what the steps are right now.

Now, some -- you can't predict something about a situation that hasn't arisen yet, Commander Swift. I'm sorry. If your concern is this -- and I don't know why you have been walking around it -- sir, are you going go back in there and say, okay, y'all, I am a lawyer and you are not and this is the law and you got to listen to me. Is that your concern basically?

DC (LCDR Swift): I do not believe you would be, sir. I am more concerned, not that you would intentionally do such a thing, I don't think you would. My concern is how a lawyer is inevitably viewed by other staff officers. It is the equivalent of my wife, who is a pilot, and I sitting in the cockpit seat and today we are going to fly an airplane and I look over and she says put the throttles forward.

PO: Okay. So is your compliant about me or about any lawyer?

DC (LCDR Swift): My concern is how we can minimize this position and how those steps would be taken to prevent it.

PO: I can't tell you what I will do in an unspecified situation. I can tell you that I am not going to say, I have been a judge for ten years and a JAG for 27 years and you got to tell -- you got to do what I tell you

about the law. That's the first thing I can tell you. The second thing is that if they need more assistance on the law I imagine and I don't know, Commander Swift, because it hasn't arisen, that if they need more instruction on the law, I will call you and Commander [REDACTED] back into court and say -- I am using his name in vain -- Colonel [REDACTED] is your question the application say of IN RE Sierra to 42 U.S.C. 1933, and he will say, yes. And I will say, Commander [REDACTED] would you explain your views on that; and he will say, whatever. And I will say, does that answer your question; and you will say something, I don't know.

DC (LCDR Swift): I understand, sir.

PO: Okay. However if you feel the urge, I always welcome briefs on any matter. That's not an order for a brief. If you want to put it in, feel free. Okay, what else, what other follow up do you have, Commander Swift?

DC (LCDR Swift): No other follow up.

PO: Challenge?

P (CDR [REDACTED]): Prosecution has no challenge.

DC (LCDR Swift): I would like to recess to consult with my client regarding --

PO: Well, I understand that, but I mean I am asking really what sort of recess do you need? Five minutes in place or fifteen minutes in the office?

DC (LCDR Swift): Fifteen minutes in the office, sir.

PO: Court is in recess.

The Commission Hearing recessed at 1115, 24 August 2004.

The Commission Hearing was called to order at 1142, 24 August 2004.

PO: The commission will come to order. Let the record reflect that only the Presiding Officer is in the commission room. The other members are not present. Defense?

P (CDR [REDACTED]) Sir, before we go further, we have a new court reporter, Sergeant [REDACTED] and she has previously been

sworn.

PO: Thank you.

DC (LCDR Swift): Yes, sir. Before entering challenges, would you permit me one more question, sir?

PO: Yeah.

DC (LCDR Swift): When you said that you are a judge advocate, were you recertified when you came back off of active -- off of retirement, or do you base that on you previously being a judge advocate?

PO: To the best of my knowledge and belief, Major General Tom Rummy -- Thomas Rummy, who is the Judge Advocate General, personally approved my retirement recall, and he is the one who certifies people as judge advocates.

DC (LCDR Swift): And you base that on your belief -- on that belief?

PO: Yeah.

DC (LCDR Swift): Notwithstanding, sir, we do challenge the Presiding Officer for cause. We have three -- excuse me, four areas.

One, we challenge the qualifications of the Presiding Officer as a judge advocate based on being recalled from retired service and not being an active member of any Bar association at the time he was recalled.

Two, despite, we understand that this is almost necessarily by the position you've been placed in, we challenge the Presiding Officer based on that the fact that he will exercise improper influence over the other members.

PO: Okay. I want to make sure you clarify this. Are you challenging the system, or are you challenging me? Because the standard is good cause that I will not perform my duties.

DC (LCDR Swift): We're challenging you, sir.

PO: Okay.

DC (LCDR Swift): We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself with the appointing authority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Additionally, based on -- although I did not attend the meeting of 15 July -- based on consultation with counsel that did, we challenge you based on having formed opinions prior to court regarding the accused's right in this trial -- the accused's right to a speedy trial in this case.

PO: Anything else?

DC (LCDR Swift): No, sir.

PO: What do you say?

P (CDR [REDACTED]) Sir, defense counsel said they're not challenging the system, they're challenging you personally. But they also said during voir dire, I don't think you would ever do anything intentionally unfair. So if it's a challenge to the individual, the prosecution doesn't believe we can do any better than a person who the defense concedes would never intentionally do anything unfair.

The defense has stated many things about conversations between the appointing authority and [REDACTED] and the appointing authority and yourself. Specifically, during those conversations between you and defense counsel on voir dire, he stated there's been no prejudice. So as we sit here today, you are not tainted, there has been no prejudice to the defense, and we have had recent changes with respect to the August 19th memo, which should preclude any appearance of this happening in the future.

Sir, we have no challenge and do not feel that there is any cause to challenge you as the Presiding Officer.

PO: I've considered your challenges for cause, Commander Swift. Under the provisions of MCI 8, I'll forward to the appointing authority for his decision and action, a transcript of the voir dire, which will include your

challenge and the reasons therefore, and the comments made by counsel. I will also forward the Presiding Officer's voir dire packet, which I believe is RE 8.

Are there any other matters that you would wish to be forwarded to him for his decision?

DC (LCDR Swift): I would wish to be able to brief, as it did come up during the course of this, the issue of qualifications.

PO: When do you think you could have that prepared?

DC (LCDR Swift): Certainly no later than next Monday.

PO: Okay. Well?

DC (LCDR Swift): I'm somewhat at a loss while down here to do that type of thing. But I can complete it by next Monday.

PO: If you will forward that to [REDACTED] and he will provide you with any cross-whatever this is to this matter, and then forward it to me, and I will get it to the appointing authority.

Anything else that should go up with this?

DC (LCDR Swift): The defense has nothing else, sir.

PO: Well, I mean the packet to the appointing authority.

P (CDR [REDACTED]) Nothing from the prosecution.

PO: Okay. Under the provisions of MCI 8 paragraph 3(a)(3), I will not hold the proceedings in abeyance.

Okay. Please recall the other members.

The members entered the courtroom.

Please be seated. The commission will come to order. Let the record reflect that all of the members of the commission are present.

Have all the commission members completed a member questionnaire?

take up with yourself outside, on the record. It has to do with your voir dire of the presiding officer.

PO: All rise.

Members, you are in recess.

The members departed the courtroom.

Be seated. The court will come to order and let the record reflect all the members except for myself have left the courtroom. All the other parties are present.

Yes, Commander?

DC (LCDR Swift): Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.

PO: And why would you like that?

DC (LCDR Swift): To go toward the idea of whether you have an opinion or not, sir.

PO: On the questions of?

DC (LCDR Swift): Speedy trial, sir.

PO: Okay. And the tape goes to show what?

DC (LCDR Swift): Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.

PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.

DC (LCDR Swift): Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.

PO: Do you think that's correct or do you think that's in reference to Article 10?

DC (LCDR Swift): My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.

PO: Okay. Why don't you ask me if I am predisposed on that.

DC (LCDR Swift): Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. So I'm telling you right now that I don't have a predisposition towards speedy trial. However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.

DC (LCDR Swift): Sir, what I would like to ask, if I transcribe it, that I send it to you first.

PO: I don't want to see it.

DC (LCDR Swift): Yes, sir.

PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?

DC (LCDR Swift): No, sir.

PO: How about you?

P (CDR [REDACTED]) No objection to the tape being sent, sir.

PO: Okay. Before I call -- I put the court in recess, Commander Swift, do you have anything else?

DC (LCDR Swift): No, sir, I don't; I really don't, we really don't, sir.

PO: Trial?

P (CDR [REDACTED]) We really, really don't, sir.

PO: Court is in recess.

The Commission Hearing recessed at 1835, 24 August 2004.

September 22, 2005

1. I, am M. Harvey, Chief Clerk of Military Commissions and the custodian of the authenticated transcript in *United States v. David M. Hicks*, No. 040001.
2. I certify that R. 6-24 (a total of 19 pages of transcript) (attached) are an accurate copy of the authenticated transcript in said case from a portion of the session held on Guantanamo Bay, Cuba on August 25, 2004.
3. There was no voir dire of the Presiding Officer at the subsequent hearings on November 1-3, 2004.

//Signed//

M. Harvey
Chief Clerk
of Military Commissions

that question keep in mind you don't want to bias other members? Any member? Apparently not.

Okay. I previously filled out a commission member questionnaire, provided counsel for both sides with a summarized biography, a list of matters that normally would be asked during voir dire, a document about how I know the appointing authority, and other personnel, and answers to questions suggested by defense counsel. That packet will now be marked as the next RE in line.

Review Exhibit 9 was marked for the record.

Those documents are true to the best of my knowledge and belief.

We had basically two pretrial conferences, present which were defense and trial and myself; and during the course of these proceedings I will be referring to them. If something happened during one of those conferences that I don't cover or you want covered, trial, defense, speak up. Okay.

During one of those, Major Mori, you and I had a discussion on the standard for challenge in the commission proceedings, and you wanted me to articulate what I, as the presiding officer, believed the standard for challenge is; is that correct?

ADC (Maj Mori): Yes, sir.

PO: Referring to MCO Number 1, Paragraph 4(A)(3) which states the qualifications for a member, and then referring to MCO 1, Paragraph 6(B)(1) and (2), I believe that the standard is whether there is good cause to believe that the member cannot impartially and expeditiously provide a full and fair trial to Mr. Hicks. Do you wish, not perhaps at this time, to articulate a different standard to the person who will make the decision in this case?

ADC (Maj Mori): Yes, sir.

PO: At a later time if we have challenges, I will tell you when you have to provide that standard. If I fail to tell you at that time, please remind me.

ADC (Maj Mori): Yes, sir.

PO: Okay. I will, however, permit you latitude in your questioning going towards the area that you want. You are looking for what we commonly called 912(N); right?

DC: Yes, sir.

PO: Okay. Thank you. Does either side want to voir dire me outside the presence of the other members?

P (LtCol [REDACTED]): No, sir.

DC (Mr. Dratell): Yes, sir.

PO: Thank you. Members, please return to the deliberation room.

Be seated. Let the record reflect the members, except for the presiding officer, have left the courtroom.

I noted yesterday that we have a joint problem here. In the Army when a single member walks into the courtroom except for the judge, no one rises. Apparently in the Naval services you all rise. Individual members of the defense and prosecution team may rise or not as they wish when the single member walks in or leaves. It is up to you, but the only requirement is when all the members come in, or I come in, you rise.

I have got a copy of the PE that was just marked -- or RE that was just marked, Number 9 which was my voir dire packet. This morning in that latest conference counsel for both sides were handed a copy of the voir dire up to where we broke for closed session yesterday. Counsel for both sides you both stated you intend to focus the voir dire on the questionnaires, and this is not just for me, it is for the other members too, in what was said in voir dire yesterday and you wish to have appended to the record of trial as RE 10 all portions of the Hamdan record of trial that were -- don't get excited yet -- that were held during the open sessions concerning voir dire. Which includes -- just a second, Major Mori -- which includes all the voir dire, all the challenges, and then at the end of the day there was a further reopening of voir dire of the presiding officer. That will be RE 10. RE 11 will be the closed session voir dire from Hamdan. I am not going to mix closed and none closed if I don't have to.

Is that what you all wanted, trial?

P (LtCol [REDACTED]): Yes, sir. Except for that it was our understanding that counsel voir dire of the whole panel would also not be --

PO: I said all the voir dire. Everyone's.

P (LtCol [REDACTED]): Yes, sir.

PO: Everything that had to do with the voir dire. You understood what I meant didn't you, Gunny? Yeah, the Gunny knew. We will look at the RE before it is finalized, okay. Is that what you want, defense?

DC (Mr. Dratell): Yes, sir.

PO: Mr. Hicks, you weren't present yesterday during the voir dire; right?

ACC: Yes, sir.

PO: Okay. Your counsel got a copy of the voir dire, somewhere on their thing. They intend to refer to it in questioning me and the other members today to what happened yesterday. You got any objection to that?

ACC: No, sir.

PO: Okay. Trial, voir dire?

P (LtCol [REDACTED]): None, sir.

PO: Defense, go on.

DC (Mr. Dratell): Yes, sir. Colonel, I want to focus first on something that was brought up yesterday with respect to your intention to advise the other members on the law, in addition to also then receiving law from either side. And in your experience as a military judge, would you ever let an attorney sitting on a military jury express an opinion as a lawyer on the law to a jury that is supposed to be made up of equal members?

PO: I have never seen an occasion to have an attorney sit on a jury panel, but no I wouldn't.

DC (Mr. Dratell): Is that what we have here, in essence, a jury

of equal members, none of whom should be superior to the other with respect to understanding or expression of the law.

PO: Okay. I will answer your question, but let me say that I believe, and I direct Major Mori to provide a brief on this, Major Mori.

ADC (Maj Mori): Yes, sir.

PO: Because there are two parts to it. The SECDEF has said there is going to be a lawyer on this panel; right?

DC (Mr. Dratell): Yes.

PO: Okay. So you're objecting or Major Mori is writing a motion objecting to the structure of the panel.

DC (Mr. Dratell): That's true.

PO: Okay. That's the structure of the panel. So it doesn't matter in many ways what I think about that because that is a structure that you can bounce me off and I believe that the appointing authority will say, okay, he's bounced and let's put another lawyer on there. Can we just let that portion of this voir dire sit as a motion to the structure, and now you can ask me what I will do.

DC (Mr. Dratell): And it is not -- it's not simply the structure but it is also your intention to advise the panel on the law, that's part of it. So it's not just that there is a lawyer because there are lawyers that sit on civilian juries all the time, they are just not permitted to advise other jurors as to the law. And that is the province of the judge, and in this situation we don't have a judge. But and in the sense that you have instructed the members that they are not required to follow your expression of the law and they are free to adopt either side's expression of the law, or yours, or their own, but do you acknowledge the possibility, and really the distinct possibility that the members, or any member, all of whom are non-lawyers will give your expression of the law more deference than they will to either counsel, or to their own?

PO: When I see Major Mori's motion, if it is made to me I will be glad to answer the structural question. Now, I will, if you want to say, Brownback, will you tell us that you

are not going to provide advice to the panel other than what you do while you are sitting here, that's a different matter. Is that what want, I mean --

DC (Mr. Dratell): No. No, my question is -- and if you consider this a structural question then you do; but my question is really do you acknowledge the possibility that a member or all of the members who are non-lawyers will give your expression of the law more deference than they will to either side's or their own?

PO: If you ask me that, I say yes. I will, however, follow up by saying there is a chance they might give Colonel [REDACTED] because he is Marine, or Major Mori's, because he is a Marine, or Major Lippert or Major [REDACTED] because they are Army, more deference. I don't know the answer to that.

DC (Mr. Dratell): Can you put a civilian on that for me?

PO: That's a structure. Major Mori, make a note, that goes into your brief. Okay. I can't go any farther than that.

DC (Mr. Dratell): You have combat experience from Vietnam; correct?

PO: Yes.

DC (Mr. Dratell): And did you have occasion to engage in combat with the North Vietnamese Army?

PO: At the time I was not worried about where they came from.

DC (Mr. Dratell): But were they regulars from the North Vietnamese Army?

PO: The intelligence reports that we gathered had them classified as both NVA and VC. And when they hit us we didn't stop them to try to figure it out; we just fired back.

DC (Mr. Dratell): But when they were taken prisoner, regardless of whether they were NVA or VC were they treated according to the Geneva Convention?

PO: Yeah.

DC (Mr. Dratell): Now, I want to explore your relationship with the appointing authority.

PO: Okay.

DC (Mr. Dratell): You have known Mr. Altenburg 1977, 1978?

PO: Yes, sometime in that frame.

DC (Mr. Dratell): And you had a professional affiliation for a period of time?

PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it.

He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of adlaw. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.

DC (Mr. Dratell): And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?

PO: Right, at the JAG school.

DC (Mr. Dratell): And he was also the primary speaker at a roast in your honor that evening?

PO: Yes.

DC (Mr. Dratell): And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.

DC (Mr. Dratell): And you also attended his son's wedding in sometime in the fall of 2002?

PO: In Orlando, yeah.

DC (Mr. Dratell): And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?

PO: Right, I did.

DC (Mr. Dratell): And you are aware that there were other candidates for the position of presiding officer?

PO: Yeah, uh-huh.

DC (Mr. Dratell): Thirty-three others, in fact?

PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got Mr. Altenburg somehow. I don't know how many other people were nominated.

DC (Mr. Dratell): So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?

PO: Well, I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.

DC (Mr. Dratell): I would like to move on and explore your relationship with Mr. [REDACTED] and his role in the

commission.

PO: Okay.

DC (Mr. Dratell): He is presently an employee of the [REDACTED]

PO: Right.

DC (Mr. Dratell): He is [REDACTED]

PO: Right.

DC (Mr. Dratell): And his long-term career goals is to remain with the [REDACTED] in that position?

PO: I don't know.

DC (Mr. Dratell): Have you seen the detailing memorandum?

PO: Yes -- but I didn't -- I mean it was a detailing memorandum. I don't know if those are his long-term goals. Do you mean does he intend to return there after the detail is over?

DC (Mr. Dratell): Yes.

PO: Yes. [REDACTED] hasn't made enough money to leave yet.

DC (Mr. Dratell): But, in fact, arrangements have been made so that he is still an employee and he is essentially on loan here part-time.

PO: He is on a detail. Right, they are offering various positions, you know, for GS-14s and 15s but he didn't want to do that, right.

DC (Mr. Dratell): So how would you answer concerns of reasonable person that the [REDACTED] is acting as a legal advisor or the assistant to the presiding officer of this commission?

PO: He is an [REDACTED] to the best of my knowledge. He has never had anything to do with operational activities. He [REDACTED]

application -- and you would have to look at whatever he wrote. I believe -- he does a lot of Fourth Amendment law and probably some Fifth Amendment law and maybe procedures. Both of which, or all of which, has nothing to do with operational activities. It is how to keep activities within the bounds of the constitution, none of which has he applied in doing what he is doing for me. So I don't see any harm. I mean you are characterizing him correctly as a [REDACTED] however, I believe when he took the job [REDACTED] the [REDACTED] didn't belong to [REDACTED] because there wasn't a [REDACTED]. I think it was a DoJ, but it may have been something else. I don't believe there is any concern there. He is not knocking down doors or searching people out. He is in [REDACTED]

DC (Mr. Dratell): But he is still affiliated with a law enforcement and [REDACTED] which is essentially tasked with terrorists -- terrorism enforcement activities.

P (LtCol [REDACTED]): Sir, I am going to object to this line of questioning at this point. This does not go toward any potential bias on your part or anything that might lead to that.

PO: That's okay. Thank you. Go on. I hear what you are saying, Mr. Dratell. I don't believe that a reasonable person who heard that a person who instructs in the law at a law enforcement -- [REDACTED] kicking down doors. But that is -- reasonable people can differ. That's my opinion.

DC (Mr. Dratell): With respect to his role in the commissions, in the August 19th memorandum from the appointing authority it says that he is to provide advice in the performance of presiding officer adjudicative functions. Can you tell us what that means, adjudicative functions?

PO: Would you do me a favor. Who signed that? Mr. Altenburg, right?

DC (Mr. Dratell): Yes.

PO: Did I sign it?

DC (Mr. Dratell): No.

PO: Okay. I don't know what that means and I am exploring with you as we go what that means. I tell you, if you want to know what he does for me I will be glad to tell you.

DC (Mr. Dratell): I am just more interested in what the interpretation of this phrase is.

PO: I don't know what it means. If it means does he -- this morning you know, Mr. [REDACTED] would you go find counsel for both sides and tell them I am ready to see them. Because that -- that is not adjudicative. He has not provide -- I will tell you this, he has not provided me any piece of advice on any item of substantive law. Now there are those who would say that writing up motions, you know, the presiding officer memorandum and stuff like that is substantive; I don't believe they are. The things that he has done have nothing to do with substance and I have not yet gotten to an adjudicative function as far as I can tell.

DC (Mr. Dratell): Well, will he? The question is under this memoranda will he be involved, and particularly in light of what you are saying is his experience in what he teaches and whether that is going to have an impact on the rest of the members, that is the questions now.

PO: Was the question then to make Colonel [REDACTED] happier? Am I going to take improper advice in my role as a member from someone who is not a member?

DC (Mr. Dratell): Advice.

PO: That's what I say advice.

DC (Mr. Dratell): But you said improper and I say any advice or any advice that any of the members get either from you or directly from Mr. [REDACTED] --

PO: No, they are not.

DC (Mr. Dratell): Now with respect to -- well, if that role changes, or is there -- are we ever going to get a definition of those terms adjudicated function in a matter that we can at least get our hands around, or for you to get your hands around so that we know what it

means?

PO: Probably on Tuesday after I get home, after I finish up this week's session, I will inquire from Mr. Altenburg what he means by that.

DC (Mr. Dratell): And will we be --

PO: I haven't sent anything to Mr. Altenburg, nor has Mr. [REDACTED] or anyone else that hasn't been furnished in voluminous copies to every counsel; right?

DC (Mr. Dratell): And so in your questionnaire you own a Koran.

PO: Yes, I do.

DC (Mr. Dratell): Have you studied it?

PO: I wrote in there also that I would not call myself a student of the Koran. I have looked at it. It was given to me in Saudi by one of the Saudis with whom I worked, and he referred me to some verses, and I looked at them. If you have ever been in Dhahran at night there is not a lot to do on the air base there.

DC (Mr. Dratell): And I assume it is in English?

PO: It is a --

DC (Mr. Dratell): Combination.

PO: One side is English and one side is Arabic.

DC (Mr. Dratell): And you obviously read the English side and not the Arabic side.

PO: Yes. Obviously, I read the English side, not the Arabic.

DC (Mr. Dratell): Thank you, sir. I have nothing further.

PO: Thank you. Trial?

P (LtCol [REDACTED]): Yes, sir. First of all on the advising the members on the law, do you -- will you be able to give all the members equal voice regardless of rank or their legal background they may or may not have?

PO: In the military order the President said that the

commission is to be the triers of fact and law. That's what he wants and that is what we are going to give him. Yes.

P (LtCol [REDACTED]: Regarding the relationship with Mr. Altenburg, first of all if you are looking at your record he would note that you had combat experience as an infantry officer in Vietnam. Is that right, sir?

PO: Yes.

P (LtCol [REDACTED]: You have five bronze stars; is that right, sir?

PO: Yeah.

P (LtCol [REDACTED]: He would also note that you had ten years experience as a military judge?

PO: Right.

P (LtCol [REDACTED]: Sir, as a military judge did you have occasion to know the convening authority?

PO: Yeah, right.

P (LtCol [REDACTED]: Did you ever have the occasion to be friends with the convening authority?

PO: I say the only friend I was with was a guy who ran a special court once down in Vincenza. We aren't friends really with three star and two star generals when you are a light colonel or colonel, but if you are talking about a personal acquaintance where I knew them, yeah. I wouldn't call myself and General Luck or General Keene, or -- I wouldn't call us friends, you know.

P (LtCol [REDACTED]: They were acquaintances like that?

PO: Right.

P (LtCol [REDACTED]: How did you handle that situation? I am sure that you were impartial and fair?

PO: I never worried about it. I just did my job, my duty.

P (LtCol [REDACTED]: Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?

PO: No. You want to ask what I think Mr. Altenburg wants from me?

P (LtCol [REDACTED]): Do you know, sir?

PO: No, I asked would you like to ask me what I think he wants?

P (LtCol [REDACTED]) Yes, sir.

PO: Okay. I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.

P (LtCol [REDACTED]) Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?

PO: You all went to law school; right?

P (LtCol [REDACTED]) Yes, sir.

PO: Remember that first semester of law school and everyone is really scared?

P (LtCol [REDACTED]) Yes, sir.

PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. I don't have a professional career. Mr. Altenburg is not going to hurt me. Okay.

P (LtCol [REDACTED]): Yes, sir. Nothing further, sir.

DC (Mr. Dratell): Just one thing, sir.

PO: Sure.

DC (Mr. Dratell): With respect to -- I don't know where this was part of the packet --

PO: That's all right.

DC (Mr. Dratell): This is the list of the nominees for presiding officer. I don't know if it is already in the packet, but if not we could just mark this as an RE.

PO: I haven't seen it, but you may mark it as an RE.

DC (Mr. Dratell): Okay, and that would be RE -- is that 13 that we are up to?

AP (Maj [REDACTED] Colonel Brownback, I just note that that is an attachment to our defense filed motion that is presently before the court.

PO: We will just do this and we can put it in the next one.

Review Exhibit 12 was marked for the record.

ADC (Maj Mori): Defense counsel has provided the court reporter with the two sheets of the list of selection for the presiding officers.

PO: Okay.

DC (Mr. Dratell): I have nothing further, sir, thank you.

PO: Prosecution, challenge?

P (LtCol [REDACTED] No, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir, on the same grounds basically yesterday that we explored again today which is the relationship with the appointing authority and also on the -- also on the advice to the commission members on the law and also --

PO: Okay. Just a second.

DC (Mr. Dratell): And also the lack of definition of Mr. [REDACTED] role and impact that that would have on both on the presiding officer and the commission as a whole, the other members here individually who are in combination.

PO: Okay.

DC (Mr. Dratell): And also the ground that was raised yesterday with respect to the speedy trial issue and comments either were or were not made I was not at the meeting so it was impossible for me to say --

PO: Predisposition?

DC (Mr. Dratell): Yes, exactly.

PO: Okay, what else?

DC (Mr. Dratell): That's it.

P (LtCol [REDACTED]): Yes, sir, the government opposes that challenge. First of all, the role of Mr. [REDACTED] we believe is just an objection to Mr. [REDACTED] role. There's no evidence that affects your impartiality and in fact throughout this it's clear that we have gotten a very independent presiding officer who is not swayed, certainly would not be swayed by Mr. [REDACTED] and he does not and has not provided legal advice, is not providing legal advice. We do not believe that is any real basis for challenge of you, sir.

The relationship with Mr. Altenburg we believe that is not problematic. Again, we have a very independent presiding officer. Mr. Altenburg is looking at various people as candidates and he comes across somebody who happens to know his reputation, sterling reputation as a military judge. He is looking at a military record and has seen combat experience in Vietnam, he has seen five bronze stars, heroism in Vietnam, somebody that can stand and not be afraid to say no to Mr. Altenburg or anybody else.

PO: I appreciate the comment, but I would have the gunny note that I don't agree with heroism in Vietnam, but go on.

P (LtCol [REDACTED]): Yes, sir. We would also note ten years as a military judge. That makes a presiding officer stand out with somebody who has an exceptional amount of experience as the military judge and that's somebody who knows how to maintain integrity and independence. And we believe that there is no grounds for your challenge, sir.

DC (Mr. Dratell): Thank you, just so I can articulate two subsets of the challenges. One is that with respect to the

relationship with Mr. Altenburg. It is also with respect to the perception of the public, the panel.

PO: Major Mori's 912(N)?

DC (Mr. Dratell): Yes, that's correct.

PO: He is writing a motion on that.

DC (Mr. Dratell): And the same with respect with Mr. [REDACTED] as a result of his employment with the [REDACTED] and his position there and so those are in conjunction with the substantive.

PC: Okay.

P (LtCol [REDACTED]): Well, sir, first we don't accept that as the standard and second of all we don't see how that is such a bad appearance. Someone who has been a district attorney becomes a judge. Does that mean that he is biased? So somebody who works at [REDACTED] who is now helping administrative matters now for the commission. How is that a bad appearance. And your appearance with your background and experience as a presiding officer we do not feel that there is any bad appearance on that.

DC (Mr. Dratell): Just that -- we don't have a situation where someone was a district attorney and is now a judge, we have someone who is still a district attorney and is now the assistant to a judge who may have adjudicated functions in a commission process.

PC: Okay. I have considered the challenges made by the defense. I am going to forward a transcript of voir dire which contains a reference to RE 12, so that will go along with it. The transcript -- that will include the transcript of the challenge and the prosecution's response. In addition, Major Mori, that motion on the 912(N) matters and your motion on the adjudicative function advice and your motion on the impropriety of the presiding officer providing legal advice -- you understand what I am saying?

ADC (Maj Mori): Yes, sir.

PO: Can you have those to opposing counsel by the 7th? You notice how much time I am giving you, for me that is a heck of a long time. And that way they can comment --

no, so this will get up to Mr. Altenburg all at the same time so he can consider your request for a different standard -- for a standard so he can consider your motion concerning whether or not I should provide advice and your motion concerning the adjudicative advice all at the same time. You get it on the 7th, trial, and you have it back to, your comments ready by the 10th and I will try to get all of this stuff in to Mr. Altenburg on the 10th because he is the one that makes the decision.

ADC (Maj Mori): Yes, sir.

PO: Okay.

P (LtCol [REDACTED]) Yes, sir.

PO: Okay. Under the provisions of MCI 8(3)(A)(3), I am not going to hold the proceedings in abeyance. Now, before I call the members in I am going to ask this question; who is lead?

DC (Mr. Dratell): I am lead.

PO: Okay. I am going to tell the members that when they come back in. Okay?

DC (Mr. Dratell): Yes, sir.

PO: I am going to call the members in and then we will go through voir dire with them generally, okay? Ready? Call the members.

Please be seated. The commission will come to order. Let the record reflect that all the parties present when the commissioned recessed are once again present.

The members are present.

Mr. Dratell, you are the lead attorney for Mr. Hicks; correct?

DC (Mr. Dratell): That's correct, sir.

PO: That means, members, generally when I call on the defense, generally he will be speaking for the defense. However, if Major Mori or Major Lippert have been cast they may pop up too.

Have all members completed a member questionnaire?
Apparently so.

Both sides have been provided a copy of those questionnaires?

P (LtCol [REDACTED]): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Apparently so. Trial, please have the a questionnaires marked as the next RE.

P (LtCol [REDACTED]): These will be marked 13 Alpha through Echo at this time.

PO: Those questionnaires will be sealed.

Members, there has been an objection to my instructing you that I will instruct you and advise you on the law. I have not granted that objection, but I am telling you that a motion will be forthcoming on that objection that you all will be seeing at some later time. Keep it in mind. Right, defense?

DC (Mr. Dratell): That's correct, sir.

PO: Okay, members, several of you indicated in your questionnaires that you had some apprehension for the safety of your families because of your participation in this military commission and the release of your names to the public. I can't go back and unbell that cat. But do all members recognize that it wasn't the trial or defense that released your name? Apparently all members recognize that.

Will the release of the names, of your names, affect in any way your ability to listen to the arguments of trial and defense and serve as a member in according to your duty in this case? Apparently not.

Counsel, you both stated that you intend to refer the voir dire in case of U.S. v. Hamdan and focus question to the members based on that voir dire. This is the same, this is RE 10 and 11. You all still going with that?

P (LtCol [REDACTED]): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Mr. Hicks, once again this is the exhibit that counsel have in front of you. You weren't here, but Mr. Dratell -- some member of the defense team was here for all voir dire; right?

DC (Mr. Dratell): That's correct, sir.

PO: Do you object to them basing their questions on this?

ACC: No, sir.

PO: Okay. Okay, Members, I asked you all several general questions yesterday. Any member want to change the answer to any of those general questions I asked about your participation? Apparently not.

Members, right now I do ask you this, probably the most important question of all of the voir dire: Does each member understand that he must disregard anything that he may have been exposed to in any way and decide the case of the United States v. Mr. Hicks solely on the evidence and the law presented to you in this courtroom? Apparently all members understand that.

Members, if counsel ask you a question and it is going to take you into a classified area -- you all know where that is, they don't, so it is on you to say can I hold that for a closed session. They aren't going to keep reminding you of that. Apparently all members understand that.

General voir dire, trial?

P (LtCol [REDACTED] Thank you, sir. Gentlemen, I am Lieutenant Colonel [REDACTED] U.S. Marine Corps. At the table with me is my co-counsel, Major [REDACTED] and my paralegal, Staff Sergeant [REDACTED] Together we represent the United States of America in this case.

Just a couple questions. First of all, since arriving here at Guantanamo Bay and up to the present has any member been contacted by the media, any contact with any media?

PO: Apparently not.